Laurence F. Pulgram (CSB No. 115163)
lpulgram@fenwick.com
Candace Morey (CSB No. 233081)
cmorey@fenwick.com
FENWICK & WEST LLP
555 California Street, 12th Floor
San Francisco, CA 94104
Telephone: (415) 875-2300
Facsimile: (415) 281-1350

Ann Brick (CSB No. 65296)
abrick@aclunc.org
AMERICAN CIVIL LIBERTIES UNION
FOUNDATION OF NORTHERN CALIFORNIA
39 Drumm Street
San Francisco, CA 94111
Telephone: (415) 621-2493
Facsimile: (4150 255-8437

Attorneys for Plaintiffs in
Dennis P. Riordan, *et al.*

Barry R. Himmelstein (CSB No. 157736)
bhimmelstein@lchb.com
LIEFF, CABRASER, HEIMANN & BERNSTEIN, LLP
275 Battery Street, 30th Floor
San Francisco, CA 94111-3339
Telephone: 415-956-1000
Facsimile: 415-956-1008

Interim Class Counsel for MCI Class

Vincent I. Parrett (CSB No. 237563)
vparrett@motleyrice.com
MOTLEY RICE LLC
28 Bridgeside Boulevard
P. O. Box 1792
Mount Pleasant, SC 29465
Telephone: (843) 216-9000
Facsimile: (843) 216-9440

Interim Class Counsel for
Verizon Class

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

IN RE:

NATIONAL SECURITY AGENCY TELECOMMUNICATIONS RECORDS LITIGATION,

This Document Relates To:

(1) All Class Actions Against MCI and Verizon Defendants in the Master MCI and Verizon Consolidated Complaint, Dkt. 125;
(2) *Bready v. Verizon Maryland* (06-6313);
(3) *Chulsky v. Cellco Partnership & Verizon Communications Inc.* (06-6570); and
(4) *Riordan v. Verizon Communications Inc.* (06-3574)

MDL No. 06-1791 VRW

DECLARATION OF CANDACE J. MOREY IN SUPPORT OF PLAINTIFFS' JOINT OPPOSITION TO MOTION TO DISMISS OR, IN THE ALTERNATIVE, FOR SUMMARY JUDGMENT BY THE UNITED STATES OF AMERICA AND TO STATE SECRETS AND RELATED ARGUMENTS IN VERIZON'S MOTION TO DISMISS

Date: August 30, 2007
Time: 2:00 p.m.
Courtroom: 6, 17th Floor
Judge: Hon. Vaughn R. Walker

Dockets.Justia.com

Jennifer L. Kelly (CSB No. 193416)
jkelly@fenwick.com
Aaron K. Perzanowski (CSB No. 244921)
aperzanowski@fenwick.com
FENWICK & WEST LLP
555 California Street, 12th Floor
San Francisco, CA 94104
Telephone: (415) 875-2300
Facsimile: (415) 281-1350

Peter J. Eliasberg (CSB No. 189110)
peliasberg@aclu-sc.org
Peter Bibring (CSB No. 223981)
pbibring@aclu-sc.org
AMERICAN CIVIL LIBERTIES UNION FOUNDATION OF SOUTHERN CALIFORNIA
1616 Beverly Boulevard
Los Angeles, CA 90026
Telephone: (213) 977-9500
Facsimile: (213) 250-3919

Nicole A. Ozer (CSB No. 228643)
nozer@aclunc.org
AMERICAN CIVIL LIBERTIES UNION FOUNDATION OF NORTHERN CALIFORNIA
39 Drumm Street
San Francisco, CA 94111
Telephone: (415) 621-2493
Facsimile: (4150 255-8437

Attorneys for Plaintiffs in Dennis P. Riordan, *et al.*

Elizabeth Cabraser (CSB No. 83151)
ecabraser@lchb.com
Eric B. Fastiff (CSB No. 182260)
efastiff@lchb.com
Allison Elgart (CSB No. 241901)
aelgart@lchb.com
LIEFF, CABRASER, HEIMANN & BERNSTEIN, LLP
275 Battery Street, 30th Floor
San Francisco, CA 94111-3339
Telephone: 415-956-1000
Facsimile: 415-956-1008 (fax)

Interim Class Counsel for MCI Class

Joshua Graeme Whitaker
(Appearing pursuant to MDL Rule 1.4 [U.S. Dist. Ct. for the Dist. of Md. Bar No. 16457])
joshuawhitaker@griffinwhitaker.com
Edward Nelson Griffin
(Appearing pursuant to MDL Rule 1.4 [U.S. Dist. Ct. for the Dist. of Md. Bar No. 16435])
edwardgriffin@griffinwhitaker.com
GRIFFIN WHITAKER LLP
8730 Georgia Avenue Suite LL100
Silver Spring, MD 20910
Telephone: (301) 587-3345
Facsimile: (888) 367-0383

Attorneys for Plaintiffs Christopher Bready, *et al.*

Ronald L. Motley
rmotley@motleyrice.com
Jodi W. Flowers
jflowers@motleyrice.com
Don Migliori
dmigliori@motleyrice.com
Justin B. Kaplan
jkaplan@motleyrice.com
MOTLEY RICE LLC
28 Bridgeside Boulevard
P. O. Box 1792
Mount Pleasant, SC 29465
Telephone: (843) 216-9000
Facsimile: (843) 216-9440

Interim Class Counsel for Verizon Class

David H. Sternlieb
dsternlieb@shapirosternlieb.com
Gary S. Shapiro
gshapiro@shapirosternlieb.com
(Appearing pursuant to MDL Rule 1.4) (U.S. Dist. Ct. for the Dist. of N.J.)
SHAPIRO & STERNLIEB, LLC
Attorneys At Law
800 Tennent Road
Manalapan, New Jersey 07726
Telephone: (732) 617-8050
Facsimile: (732) 617-8060

Counsel for Plaintiffs Glen Chulsky, *et al.*

FENWICK & WEST LLP
ATTORNEYS AT LAW
SAN FRANCISCO

DECLARATION OF CANDACE J. MOREY

I, CANDACE J. MOREY, declare and state:

1. I am a member in good standing of the State Bar of California, and admitted to practice in this district. I am an associate in the law firm of Fenwick & West, LLP which is counsel for plaintiffs Dennis P. Riordan, et al., in this multidistrict litigation proceeding. I have personal knowledge of the matters set forth herein, and could and would testify competently thereto if called upon to do so.

2. Attached hereto are true and correct copies of the following documents:

Exhibit A: Transcript of *President's Radio Address*, December 17, 2005, https://www.whitehouse.gov/news/releases/2005/12/print/20051217.html.

Exhibit B: Transcript of *Press Briefing by Attorney General Alberto Gonzales and General Michael Hayden, Principal Deputy Director for National Intelligence, December 19, 2005*, http://www.whitehouse.gov/news/releases/2005/12/print/20051219-1.html.

Exhibit C: *Preserving Prosecutorial Independence: Is the Department of Justice Politicizing the Hiring and Firing of U.S. Attorneys? – Part IV: Hearing Before the S. Judiciary Comm.*, 110th Cong. (2007) (testimony of James Comey, Former Deputy Attorney General).

Exhibit D: Responses to *Written Questions to Former Deputy Attorney General James B. Comey Submitted by Senator Patrick Leahy May 22, 2007*, http://leahy.senate.gov/press/200705/052507ComeyResponse.pdf.

Exhibit E: *Wartime Executive Power and the National Security Agency's Surveillance Authority: Hearing Before the S. Judiciary Comm.*, 109th Cong. (2006) (testimony of Alberto Gonzales, U.S. Attorney General).

Exhibit F: Paul Kane, *Ashcroft Tells of Surveillance Disputes*, Wash. Post, June 22, 2007, http://www.washingtonpost.com/wp-dyn/content/article/2007/06/21/AR2007062101022.html?hpid=moreheadlines.

Exhibit G: Letter from John Conyers and Jerrold Nadler, U.S. House of Representatives, to

Alberto Gonzales, U.S. Attorney General, May 17, 2007, http://judiciary.house.gov/Media/PDFS/Conyers-Nadler070517.pdf.

Exhibit H: Lesley Cauley, *NSA Has Massive Database of Americans' Phone Calls*, USA Today, May 11, 2006.

Exhibit I: Eric Lichtblau & James Risen, *Spy Agency Mined Vast Data Drove, Officials Report*, N.Y. Times, Dec. 24, 2005.

Exhibit J: Seymour Hersh, *Listening In*, New Yorker, May 29, 2006.

Exhibit K: Lowell Bergman, Eric Lichtblau, Scott Shane, & Don Van Natta Jr., *Spy Agency Data after Sept. 11 Led F.B.I. to Dead Ends*, N.Y. Times, Jan. 17, 2006.

Exhibit L: Shane Harris, *NSA Spy Program Hinges on State-of-the-Art Technology*, Nat'l J., Jan. 20, 2006, http://www.govexec.com/dailyfed/0106/012006nj1.htm.

Exhibit M: Barton Gellman, Dafna Linzer, & Carol D. Leonnig, *Surveillance Net Yields Few New Suspects*, Wash. Post, Feb. 5, 2006.

Exhibit N: Transcript of White House Press Conference, *President Bush and Prime Minister John Howard of Australia Participate in Joint Press Availability*, May 16, 2006, http://www.whitehouse.gov/news/releases/2006/05/20060516-1.html.

Exhibit O: Transcript of "Operation GlobalCon" Press Conference, May 23, 2006, http://www.usdoj.gov/ag/speeches/2006/ag_speech_0605231.html.

Exhibit P: Transcript of Senator Roberts' Statements, *Senate Intelligence Chair Readies for Hayden Hearings*, NPR's All Things Considered, May 17, 2006.

Exhibit Q: Gloria Borger, CBS/AP, *Congress to Be Briefed on NSA*, May 16, 2006, http://www.cbsnews.com/stories/2006/05/17/national/main1624039.shtml.

Exhibit R: Transcript of *Press Briefing by Tony Snow*, May 16, 2006, http://www.whitehouse.gov/news/releases/2006/05/20060516-4.html.

Exhibit S: Letter from John D. Negroponte, Director of National Intelligence, to J. Dennis Hastert, Speaker of the U.S. House of Representatives, May 17, 2006, *available at* http://www.usatoday.com/news/2006-05-17-nsa-list.pdf.

Exhibit T: Transcript of Senator Kit Bond's Statements, *NSA Wire Tapping Program*

Revealed, PBS Online Newshour Debate, May 11, 2006, http://www.pbs.org/newshour/bb/law/jan-june06/nsa_05-11.html.

Exhibit U: Transcript of *Interview with Bill Frist*; *Interview with Stephen Hadley*, CNN Late Edition with Wolf Blitzer, May 14, 2006, http://transcripts.cnn.com/TRANSCRIPTS/0605/14/le.01.html.

Exhibit V: Transcript of *Press Briefing by Tony Snow*, May 17, 2006, http://www.whitehouse.gov/news/releases/2006/05/20060517-4.html.

Exhibit W: Susan Page, *Lawmakers: NSA Database Incomplete*, USA Today, June 30, 2006.

Exhibit X: *The Department of Homeland Security State and Local Fusion Center Program: Advancing Information Sharing while Safeguarding Civil Liberties: Hearing of the Subcomm. on Intelligence, Information Sharing, and Terrorism Risk Assessment of the Comm. of the H. Homeland Security Comm.*, 110th Cong. (2007) (statement of Rep. Jane Harman).

Exhibit Y: News Release, *Full Statement from Attorney of Former Qwest CEO Nacchio*, Wall St. J. Online, May 12, 2006, *available to subscribers at* http://online.wsj.com/article/SB114744615734351338.html.

Exhibit Z: Lee Hochberg, *New Cell Phone Technology Can Track Users*, PBS Online NewsHour, aired Apr. 11, 2007, http://www.pbs.org/newshour/bb/science/jan-june07/cellphones_04-11.html.

Exhibit AA: News Release, *Verizon Issues Statement on NSA and Privacy Protection*, May 12, 2006, http://newscenter.verizon.com/press-releases/verizon/2006/page.jsp?itemID=29670741.

Exhibit BB: News Release, *Verizon Issues Statement on NSA Media Coverage*, May 16, 2006, http://newscenter.verizon.com/proactive/newsroom/release.html?id=93450.

Exhibit CC: Jim Drinkard, *Verizon Says It Isn't Giving Call Records to Verizon*, USA Today, May 16, 2006, http://www.usatoday.com/news/washington/2006-05-16-verizon-nsa_x.htm.

Exhibit DD: Matt Richtel and Andrew R. Sorkin, *Verizon Agrees to Acquire MCI For $6.6*

Billion, Beating Qwest, N.Y. Times, Feb. 14, 2005.

Exhibit EE: Excerpts of FCC Industry Analysis and Technology Division Wireline Competition Bureau, Trends in Telephone Service, (June 21, 2005), http://www.fcc.gov/Bureaus/Common_Carrier/Reports/FCC-State_Link/IAD/trend605.pdf.

Exhibit FF: Leslie Cauley & John Diamond, *Telecoms Let NSA Spy on Calls*, USA Today, Feb. 6, 2006.

Exhibit GG: *Recent Verizon History*, http://investor.verizon.com/profile/history/history_001.aspx, which I caused to be printed on June 21, 2007.

Exhibit HH: *The Inspector General's Independent Report on the F.B.I.'s Use of National Security Letters: Hearing Before the H. Judiciary Comm.*, 110th Cong. (2007) (testimony of Valerie Caproni, FBI General Counsel and Glenn A. Fine, DOJ Inspector General).

Exhibit II: Excerpts of DOJ Office of the Inspector General, *A Review of the Federal Bureau of Investigation's Use of National Security Letters* (Mar. 2007), http://www.usdoj.gov/oig/special/s0703b/final.pdf.

Exhibit JJ: John Solomon, *FBI Finds It Frequently Overstepped in Data Collection*, Wash. Post, June 14, 2007.

Exhibit KK: Excerpts of U.S. Attorney General John Ashcroft, *Attorney General's Guidelines for FBI National Security Investigations and Foreign Intelligence Collection* (Oct. 31, 2003), http://www.usdoj.gov/olp/nsiguidelines.pdf.

3. I am familiar with the records and proceedings in this action, with the exception of the *in camera*, *ex parte* materials submitted to the Court by the Government. Plaintiffs have diligently developed the factual record relating to their claims. Although Plaintiffs contend that their pleadings and evidence already set forth in the record of these proceedings are sufficient to defeat the Government's "motion to dismiss, or, in the alternative, for summary judgment," 06 MDL 1791 Dkt. 253, should the Court believe that critical evidence is missing (whether by operation of the state secrets privilege or otherwise), Plaintiffs respectfully submit that further

information supporting their claims is in the hands of other parties. Non-privileged discovery is likely to reveal additional facts that will contribute to the genuine issues of material fact, thereby warranting denial of the Government's "alternative" motion for summary judgment.

4. The information that Plaintiffs intend to uncover through discovery exists in several sources, as outlined below. As a preliminary matter, Plaintiffs would ask the Court to require Defendants to answer the Master MCI and Verizon Consolidated Complaint, the *Bready* Complaint, the *Chulsky* Amended Complaint, and the *Riordan* Complaint, thereby potentially generating admissions that would support Plaintiffs' claims.

5. Under the multi-step protocol of the Foreign Intelligence Surveillance Act ("FISA"), Section 1806(f), whereby Congress superseded the common law state secrets privilege to allow courts to review sensitive material on all motions "to discover or obtain applications or orders or other materials relating to electronic surveillance," 50 U.S.C. § 1806, and under Section 1845(f) authorizing judicial review on motions "to discover, obtain, or suppress evidence or information obtained or derived from the use of a pen register or trap and trace device," 50 U.S.C. § 1845(f), Plaintiffs would propound targeted discovery on MCI and Verizon seeking information on the interception and disclosure of Plaintiffs' communications and records to the Government. To the extent that the Court finds that it needs additional information on the challenged surveillance, and the Government asserts that such information would harm national security, the procedures of Sections 1806(f) and 1845(f) provide for the requisite discovery without undue risk of public disclosure.

6. Specifically, Plaintiffs would propound targeted discovery on MCI and Verizon on the existence of the content monitoring program, whereby MCI and Verizon could, among other things, "confirm or deny the existence of a certification authorizing monitoring of communication content through a combination of responses to interrogatories and *in camera* review by the Court." *Hepting v. AT&T Corp.*, 439 F. Supp. 2d 974, 997 (N.D. Cal. 2006).

7. After the *Hepting* opinion was rendered, the Government and Verizon made statements confirming the existence of the Government's domestic monitoring of communications records. *See e.g.*, Ex. HH (March 20, 2007 testimony of FBI General Counsel

Caproni before Congress); Ex. Z (April 11, 2007 statement of Verizon Wireless Regional President Kelly Kurtzman on PBS NewsHour). Plaintiffs would propound targeted discovery on MCI and Verizon on the existence of the records monitoring program, including whether either received certification authorizing monitoring of communications records, through a combination of responses to interrogatories and *in camera* review by the Court.

8. Plaintiffs would serve requests for admissions regarding the facts of MCI and Verizon's interception of Plaintiffs' communications for the Government.

9. Plaintiffs would serve requests for admissions regarding the facts of MCI and Verizon's interception of Plaintiffs' call records for the Government.

10. Plaintiffs would serve requests for admissions regarding the facts of MCI and Verizon's disclosure of Plaintiffs' communications to the Government.

11. Plaintiffs would serve requests for admissions regarding the facts of MCI and Verizon's disclosure of Plaintiffs' call records to the Government.

12. The Government has previously stated in open court in *Hepting* that AT&T documents obtained by Mark Klein and accompanying declarations, "which documents allegedly demonstrate how AT&T has implemented a warrantless surveillance system on behalf of the NSA" did "not . . . contain classified information." *Hepting*, 439 F.Supp.2d at 979, 989 (citing 6/23/06 Transcript at 76:9-20). The MCI and Verizon Plaintiffs would serve requests for admissions, interrogatories, and document production requests on MCI and Verizon seeking information on their network architecture and the manner in which they keep their call records.

13. Plaintiffs would seek to obtain declarations from, or propound depositions on written questions to, the confidential sources quoted in the news reports (set forth in Exhibits described *supra*) to overcome the hearsay nature of the news reports in which they were quoted, to the extent Plaintiffs are able to identify those confidential sources.

14. Plaintiffs would take depositions of Qwest executives regarding public statements made by Qwest executives that the NSA asked Qwest to intercept and disclose customer communications and records. *See* Ex. Y.

15. Each of the topics of targeted discovery outlined above is highly likely to yield

further evidence of genuine dispute of material facts relating to Plaintiffs' claims.

I declare under penalty of perjury of the laws of the United States that the foregoing is true and correct. Executed this 22nd day of June, 2007, at San Francisco, California.

/s/ Candace J. Morey
Candace J. Morey

FENWICK & WEST LLP
ATTORNEYS AT LAW
SAN FRANCISCO